

JEFFER, MANGELS, BUTLER & MARMARO LLP  
 ROBERT C. GEBHARDT (Bar No. 48965), rcg@jmbm.com  
 MICHAEL A. GOLD (Bar No. 90667), mag@jmbm.com  
 MATTHEW S. KENEFICK (Bar No. 227298), msk@jmbm.com  
 Two Embarcadero Center, Fifth Floor  
 San Francisco, California 94111-3824  
 Telephone: (415) 398-8080  
 Facsimile: (415) 398-5584

Attorneys for Defendant and Counterclaimant FAMILYMEDS  
 GROUP, INC., f/k/a DRUGMAX, INC., a Nevada corporation and  
 Cross-Complainant FAMILYMEDS, INC., a Connecticut  
 corporation

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 OAKLAND DIVISION

MCKESSON CORPORATION, a Delaware  
 corporation,

Plaintiff,  
 v.

FAMILYMEDS GROUP, INC., f/k/a  
 DRUGMAX, INC., a Nevada corporation,

Defendant.

FAMILYMEDS GROUP, INC., f/k/a  
 DRUGMAX, INC., a Nevada corporation,

Counterclaimant,  
 v.

MCKESSON CORPORATION, a Delaware  
 corporation,

Counterdefendant.

FAMILYMEDS, INC., a Connecticut  
 corporation,

Cross-Complainant,  
 v.

MCKESSON CORPORATION, a Delaware  
 corporation,

Cross-Defendant.

CASE NO. CV07-5715 WDB

**DECLARATION OF MATTHEW S.  
 KENEFICK AND REQUEST FOR  
 JUDICIAL NOTICE IN SUPPORT OF  
 MOTION FOR ORDER GRANTING  
 FAMILYMEDS, INC. LEAVE TO DISMISS  
 CROSS-COMPLAINT WITHOUT  
 PREJUDICE**

**FRCP 41(a)(2)**

**Accompanying papers:** Notice and  
 Motion/Memorandum of Points and Authorities;  
 and (Proposed) Order

Time: August 20, 2008  
 Date: 1:30 p.m.  
 Place: Ctrm. 4  
 1301 Clay St., 3d Floor  
 Oakland, CA  
 Judge: The Hon. Wayne D. Brazil

Complaint filed: Nov. 9, 2007  
 Counterclaim filed: Dec. 17, 2007  
 Cross-Complaint Filed: Dec. 17, 2007  
 Trial date: none set

1 I, Matthew S. Kenefick, declare:

2 1. I am an attorney at law duly licensed to practice before all the Courts of the state of  
3 California, as well as all of the United States District Courts located within the state of California,  
4 and am an attorney with Jeffer, Mangels, Butler & Marmaro LLP ("**JMBM**"), attorneys of record  
5 for Defendant and Counterclaimant Familymeds Group, Inc., f/k/a Drugmax, Inc., a Nevada  
6 corporation ("**FM Group**") and Cross-Complainant Familymeds, Inc., a Connecticut corporation  
7 ("**FM Inc.**") (collectively, "**Familymeds**"). I have personal knowledge of the facts set forth in this  
8 declaration and could competently testify to each of the facts if called upon to do so. My  
9 knowledge of the facts set forth in this declaration arises from the fact that at all applicable times,  
10 either I or one of my colleagues at JMBM have been one of the attorneys primarily responsible for  
11 the litigation of the within action.

12 2. On November 9, 2007, McKesson filed its Complaint for Breach of Contract against  
13 Familymeds Group (the "**Complaint**") (the "**First Action**"). Attached hereto as **Exhibit 1** is a true  
14 and correct copy of the Complaint, of which, pursuant to Federal Rule of Evidence 201,  
15 Familymeds respectfully requests the Court take judicial notice.

16 3. On December 17, 2007, Familymeds filed their Counterclaim for Specific  
17 Performance of Contract and Accounting; Cross-Complaint for Accounting seeking an accounting  
18 under contract and in equity (the "**Counterclaim**"). Attached hereto as **Exhibit 2** is a true and  
19 correct copy of the Counterclaim, of which, pursuant to Federal Rule of Evidence 201, Familymeds  
20 respectfully requests the Court take judicial notice.

21 4. On January 14, 2008, McKesson filed its Motion to Dismiss Counterclaim for  
22 Specific Performance of Contract and Accounting and Cross-Complaint for Accounting (the  
23 "**Motion to Dismiss**"). Attached hereto collectively as **Exhibit 3** are true and correct copies of the  
24 Motion to Dismiss and McKesson's Reply in support thereof, of which, pursuant to Federal Rule of  
25 Evidence 201, Familymeds respectfully requests the Court take judicial notice.

26 5. On May 5, 2008, the Court heard and denied McKesson's Motion to Dismiss without  
27 prejudice, directing FM Inc. to either file a motion to join the First Action or to re-file its claims in a  
28 separate lawsuit (the "**May 5 Order**"). Attached hereto as **Exhibit 4** is a true and correct copy of

1 the May 5 Order, of which, pursuant to Federal Rule of Evidence 201, Familymeds respectfully  
2 requests the Court take judicial notice.

3 6. On June 4, 2008, McKesson filed its Motion for Summary Judgment (the "**MSJ**").  
4 Attached hereto as **Exhibit 5** is a true and correct copy of McKesson's Notice of Motion; Motion for  
5 Summary Judgment or, in the Alternative, Summary Adjudication by McKesson Corporation; and  
6 Memorandum of Points and Authorities, of which, pursuant to Federal Rule of Evidence 201,  
7 Familymeds respectfully requests the Court take judicial notice.

8 7. On June 6, 2008, in the related matter of *Familymeds Inc. etc. et al. v. McKesson*  
9 *Corp. etc. et al.*, United States District Court, Northern District of California Case Number CV08-  
10 2850 WBD, filed on June 6, 2008 (the "**Second Action**") (the First Action and Second Action are  
11 collectively referred to herein as the "**Actions**"), Familymeds filed their Complaint for Specific  
12 Performance of Contract and Accounting (the "**Second Complaint**"). Attached hereto as **Exhibit 6**  
13 is a true and correct copy of the Second Complaint, of which, pursuant to Federal Rule of Evidence  
14 201, Familymeds respectfully requests the Court take judicial notice.

15 8. On June 12, 2008, Familymeds requested McKesson stipulate to the First Action  
16 being designated as related to the Second Action. McKesson would not stipulate. Accordingly, on  
17 June 16, 2008, Familymeds filed its Administrative Motion to Consider Whether Cases Should be  
18 Related (the "**Administrative Motion**"). On June 18, 2008, McKesson filed its opposition to  
19 Familymeds' Administrative Motion. On June 19, 2008, the Court entered its order granting  
20 Familymeds' Administrative Motion, thereby designating the Actions as related and re-assigning the  
21 Second Action to Judge Brazil (the "**June 19 Order**"). Attached hereto as **Exhibit 7** is a true and  
22 correct copy of the June 19 Order, of which, pursuant to Federal Rule of Evidence 201, Familymeds  
23 respectfully requests the Court take judicial notice.

24 9. On July 14, 2008, I left a voicemail message for Maria Pum, Counsel for McKesson,  
25 requesting that McKesson stipulate to the dismissal of the Cross-Complaint without prejudice. On  
26 July 15, 2008, I received from Ms. Pum an e-mail stating that McKesson would not so stipulate.  
27 Attached hereto as **Exhibit 8** is a true and correct copy of Ms. Pum's July 15, 2008 e-mail.

28 10. I thereafter requested by e-mail that that McKesson stipulate to continuing the

1 hearing on the MSJ for a sufficient period of time for the Court to determine Familymeds' motion  
2 for an order granting leave to dismiss the Cross-Complaint without prejudice. Ms. Pum rejected  
3 that request as well, agreeing to have the motion heard concurrently with the MSJ on August 20,  
4 2008. Attached hereto as **Exhibit 9** is a true and correct copy of this e-mail correspondence chain  
5 between Ms. Pum and myself.  
6

7 I declare under penalty of perjury that the foregoing is true and correct.

8 Executed on July 16, 2008

/s/ Matthew S. Kenefick  
MATTHEW S. KENEFICK, Declarant

JMBM  
Jeffer Mangels  
Butler & Marmaro LLP